

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE  
COMMISSION

IN RE THE MATTER OF:

JOINT APPLICATION OF LOUISVILLE GAS )  
AND ELECTRIC COMPANY AND KENTUCKY )  
UTILITIES COMPANY FOR A CERTIFICATE OF )  
PUBLIC CONVENIENCE AND NECESSITY FOR )  
CONSTRUCTION OF TRANSMISSION FACILITIES )  
IN JEFFERSON, BULLITT, MEADE, AND HARDIN )  
COUNTIES, KENTUCKY )

CASE NO.  
2005-00142

\* \* \* \* \*

DIRECT TESTIMONY OF CATHY AND  
DENNIS CUNNINGHAM

\* \* \* \* \*

Filed July 21, 2005

1. **Q. Please state your name and address.**

2. A. My name is Cathy L. Cunningham. My husband,  
3. Dennis, and I live at 2530 North Highway 11 SE,  
4. Elizabeth, Indiana, 47117. Dennis has reviewed this  
5. testimony and we submit this testimony together.

6. **Q. What is your interest in this case?**

7. A. Our interest in this case is our property in  
8. Hardin County - CDH Nature Preserve - located at 2697  
9. Bethlehem Academy Road, Cecilia, Kentucky.

10. **Q. Describe CDH Nature Preserve, including the  
11. improvements you and Dennis have made there.**

12. A. We purchased the first 46 acres in August, 2001,  
13. and an additional 104 acres in December, 2003. It is a  
14. beautiful rural landscape and we want to keep the  
15. farmland from being developed. We have 1/2 mile of  
16. road frontage on Bethlehem Academy Road, and 1/2 mile  
17. of road frontage on St. John's Road which makes up the  
18. 104 acres of prime farmland currently in soybeans.  
19. The previous owner of the 46 acres of land that  
20. we call Camp Deer Haven, had used it as a dump. In  
21. the first year we removed truckloads of waste; over  
22. 50 used car tires, remnants of railroad ties and  
23. pieces of track, along with machinery and trash.  
24. The property included a small pond, which we have

1. enlarged. It is now a five-acre lake that attracts a  
2. wide variety of birds. We are in the migratory path of  
3. sand hill cranes. Thousands of them winter here from  
4. mid-February to mid-March, drinking and bathing in our  
5. lake. We even had an endangered whooping crane this  
6. past spring, possibly the first such bird to visit  
7. Kentucky in over 60 years. We hope and pray it can  
8. return to habitat left intact. Among the unusual birds  
9. sighted at the preserve are Belted Kingfishers, Great  
10. Blue Herons, Green Herons, Bitterns, American  
11. Woodcocks, as well as the usual backyard birds, ducks,  
12. Canadian geese and snow geese.

13. The property also contains approximately 25 acres  
14. of "high-level wetland woods", according to  
15. representatives of the U.S. Army Corps of Engineers,  
16. who visited the site in June, 2005. These wetlands are  
17. extremely rare in this part of the state and should be  
18. preserved for that reason alone. I have requested a  
19. copy of the site visit report from Dr. Patti G.  
20. Jarrett and Greg McKay, biologists, USACOE, Louisville  
21. District, but I have not received it yet.

22. Dennis and I both grew up on farms and missed the  
23. wide open space; we decided to purchase land in

1. Kentucky where we have lots of family and friends. We  
2. had dreams of building our retirement home at the  
3. nature preserve, overlooking the lake, wooded  
4. wetlands, open fields under the clear blue sky so we  
5. could sit and watch wildlife in our golden years. We  
6. also dream of one day allowing schoolchildren the  
7. opportunity to visit our beautiful property on field  
8. trips to study nature in our wetland woods.  
9. One of the other reasons we built the lake was to  
10. help slow down the massive amounts of water that  
11. drained across our property and previously flooded  
12. Bethlehem Academy Road. We had no financial help from  
13. any federal or state agency. We incurred the total  
14. cost of the lake expansion on our own and completed it  
15. in August, 2003.

16. **Q. What are your concerns about the proposed**  
17. **transmission facilities at issue here?**

18. A. We built the lake to attract wildlife, but the  
19. high-voltage transmission lines crossing the center of  
20. the lake and cutting through the middle of the wetland  
21. woods will be detrimental to that wildlife and the  
22. habitat they need for survival. Numerous studies show  
23. that thousands of birds die every year by

1. electrocution, from flying into the ground wires above  
2. high voltage transmission lines. We specifically built  
3. our lake to attract deer, turkey and especially water  
4. fowl. Having this transmission line going through the  
5. center of their landing flight pattern into our lake  
6. is detrimental to their survival.

7. I have received information from an environmental  
8. engineering and science expert, Dr. Petra Pless,  
9. concerning the risks of (1) electrocution of large  
10. birds, mostly raptors, sitting on poles and (2) bird  
11. collisions with ground wires that run above the  
12. conducting wires of high-voltage transmission lines.  
13. She is unable to come to Kentucky on short notice and  
14. testify at the June 26 hearing, but I have attached to  
15. this document both her curriculum vitae and the cover  
16. pages of four important references that she recommends  
17. on this topic.

18. **Q. Have you had adequate time to prepare your case?**  
19. **before the Public Service Commission?**

20. A. No, absolutely not. We have had only 6 weeks to  
21. prepare whereas LG&E has had 2+ years to present  
22. their case with unlimited attorneys and no regard to  
23. expense. We landowners have not received due process,  
24. let alone adequate time to obtain expert witnesses on

1. such short notice. LG&E planned this several years in  
2. advance and it is unreasonable to expect ordinary  
3. landowners to have comparable resources at their  
4. disposal; furthermore, this hearing concerns  
5. transmission lines for a power plant expansion where  
6. proof of necessity is not yet demonstrated.

7. **Q. What do you want the Public Service Commission to**  
8. **do in the matter of Case No. 2005-00142?**

9. A. We want the Public Service Commission to deny  
10. this transmission line application. There are already  
11. two 345,000 KV lines coming into the Elizabethtown  
12. Substation, one from the east and one from the west.  
13. Another 345,000 KV line would be redundant and would  
14. be another substantial financial hit for Kentucky  
15. ratepayers. KU ratepayers are already going to be  
16. required to pay an additional \$7.00 per month and LG&E  
17. ratepayers 32 cents for the pollution controls  
18. mandated by the federal government. The ratepayers  
19. cannot afford another substantial hit with the cost of  
20. TC-2 and the transmission line proposals. CDH  
21. Preserve is a KU ratepayer. We question what  
22. percentage of this total project would go to the  
23. customers and what percentage would flow over and

1. through the ratepayers on the grid to be retailed to  
2. other utilities? We question just what incentives  
3. there are for landowners who wish to preserve property  
4. for future generations. Dennis and I do not intend to  
5. develop this property in our lifetime; but if this  
6. transmission line comes through, our dreams of  
7. maintaining it in its natural state will be destroyed  
8. forever. The state of Kentucky has placed high value  
9. on property preserved by private landowners and  
10. this should be honored by utilities, especially  
11. for-profit utilities.

12. **Q. Does this conclude your testimony?**

13. A. YES.

## **ATTACHMENT 1**

## Petra Pless, D.Env.

440 Nova Albion Way  
San Rafael, CA 94903  
(415) 492-2131 voice  
(775) 254-5849 fax  
ppless@earthlink.net

Dr. Pless has over 10 years of experience in environmental engineering and science conducting and managing interdisciplinary environmental research projects and preparing and reviewing environmental permits and other documents for U.S. and European stakeholder groups. This broad-based experience includes air quality and air pollution control; water quality, water supply, and water pollution control; biology; public health and safety; noise studies and mitigation; National Environmental Policy Act (“NEPA”), California Environmental Quality Act (“CEQA”), and Clean Air Act (“CAA”) review; industrial ecology and risk assessment; and use of a wide range of environmental software.

### EDUCATION

Doctorate in Environmental Science and Engineering (D.Env.), University of California,  
Los Angeles, 2001

M.S. Biology (with focus on botany/ecology/limnology), Technical University of Munich, Germany,  
1991

### PROFESSIONAL HISTORY

Leson & Associates (previously Leson Environmental Consulting), Kensington, CA, Environmental  
Scientist/Project Manager, 1997–present

University of California Los Angeles, Graduate Research Assistant/Teaching Assistant, 1994–96

ECON Research and Development, Environmental Scientist, Ingelheim, Germany, 1992–93

Biocontrol, Environmental Projects Manager, Ingelheim, Germany, 1991–92

### REPRESENTATIVE EXPERIENCE

#### Air Quality and Pollution Control

Projects include CEQA/NEPA review; attainment and non-attainment new source review (“NSR”), prevention of significant deterioration (“PSD”) and Title V permitting; control technology analyses (BACT, LAER, RACT, BARCT, MACT); technology evaluations and cost-effectiveness analyses; criteria and toxic pollutant emission inventories; emission offsets; ambient and source monitoring; analysis of emissions estimates and ambient air pollutant concentration modeling. Some typical projects include:

- Critically reviewed and prepared technical comments on the air quality, biology, noise, water quality, and public health and safety sections of CEQA/NEPA documents for numerous commercial, residential, and industrial projects (*e.g.*, power plants, airports, residential developments, retail developments, refineries, quarries and mines).

- Critically reviewed and prepared technical comments on the air quality and public health sections of the Los Angeles Airport Master Plan (Draft, Supplement, and Final Environmental Impact Statement/Environmental Impact Report) for the City of El Segundo. Provided technical comments on the Draft and Final General Conformity Determination for the preferred alternative submitted to the Federal Aviation Administration.
- For several California refineries, evaluated compliance of fired sources with Bay Area Air Quality Management District (“BAAQMD”) Rule 9-10. This required evaluation and review of hundreds of source tests to determine if refinery-wide emission caps and compliance monitoring provisions were being met.
- Critically reviewed and prepared technical comments on Draft Title V permits for several refineries and other industrial facilities in California.
- Evaluated the public health impacts of locating big-box retail developments in densely populated areas in California and Hawaii. The impacts of diesel exhaust emissions and noise on surrounding residential communities were measured and evaluated.
- In conjunction with the permitting of several residential and commercial developments, conducted studies to determine baseline concentrations of diesel exhaust particulate matter using an aethalometer.
- For an Indiana steel mill, evaluated technology to control NOx and CO emissions from fired sources, including electric arc furnaces and reheat furnaces, to establish BACT. This required a comprehensive review of U.S. and European operating experience. The lowest emission levels were being achieved by steel mills using selective catalytic reduction (“SCR”) and selective non-catalytic reduction (“SNCR”) in Sweden and The Netherlands.
- For a California petroleum coke calciner, evaluated technology to control NOx, CO, VOCs, and PM10 emissions from the kiln and pyroscrubbers to establish BACT and LAER. This required a review of state and federal clearinghouses, working with regulatory agencies and pollution control vendors, and obtaining and reviewing permits and emissions data from other similar facilities. The best-controlled facilities were located in the South Coast Air Quality Management District (“SCAQMD”).
- For a Kentucky coal-fired power plant, identified the lowest NOx levels that had been permitted and demonstrated in practice to establish BACT. Reviewed operating experience of European, Japanese, and U.S. facilities and evaluated continuous emission monitoring data. The lowest NOx levels had been permitted and achieved in Denmark and in the U.S. in Texas and New York.
- In support of efforts to lower the CO BACT level for power plant emissions, evaluated the contribution of CO emissions to tropospheric ozone formation and co-authored report on same.
- Critically reviewed and prepared technical comments on applications for certification (“AFCs”) for several natural-gas fired and geothermal power plants in California permitted by the California Energy Commission (“CEC”). The comments addressed construction and operational emissions inventories and dispersion modeling, BACT for turbines, etc.
- Critically reviewed and prepared technical comments on draft PSD permits for several natural-gas fired power plants in California, Indiana, and Oregon. The comments addressed emission inventories, BACT, case-by-case MACT, compliance monitoring, cost-effectiveness analyses, and enforceability of permit limits.
- For a California refinery, evaluated technology to control NOx and CO emissions from CO Boilers to establish RACT/BARCT to comply with BAAQMD Rule 9-10. This required a review of BACT/RACT/LAER clearinghouses, working with regulatory agencies across the U.S., and

reviewing federal and state regulations and State Implementation Plans (“SIPs”). The lowest levels were required in a SCAQMD rule and in the Texas SIP.

- In support of several federal lawsuits filed under the Clean Air Act, prepared cost-effectiveness analyses for SCR and oxidation catalysts for simple cycle gas turbines and evaluated opacity data.
- Provided comprehensive environmental and regulatory services for an industrial laundry chain. Facilitated permit process with the SCAQMD. Developed test protocol for VOC emissions, conducted field tests, and used mass balance methods to estimate emissions. Reduced disposal costs for solvent-containing waste streams by identifying alternative disposal options. Performed health risk screening for air toxics emissions. Provided permitting support with SCAQMD. Renegotiated sewer surcharges with wastewater treatment plant. Identified new customers for shop-towel recycling services.
- Designed computer model to predict performance of biological air pollution control (biofilters) as part of a collaborative technology assessment project, co-funded by several major chemical manufacturers. Experience using a wide range of environmental software, including air dispersion models, air emission modeling software, database programs, and geographic information systems (“GIS”).

### Water Quality and Pollution Control

Experience in all phases of water quality and pollution control, including surface water and ground water quality and supply studies, evaluating water and wastewater treatment technologies, and identifying, evaluating and implementing pollution controls. Some typical projects include:

- For a homeowner’s association, reviewed a California Coastal Commission staff report on the replacement of 12,000 linear feet of wooden bulkhead with PVC sheet pile armor. Researched and evaluated impact of proposed project on lagoon water quality, including sediment resuspension, potential leaching of additives and sealants, and long-term stability. Summarized results in technical report.
- For a 500-MW combined-cycle power plant, prepared a study to evaluate the impact of proposed groundwater pumping on local water quality and supply, including a nearby stream, springs, and a spring-fed waterfall. The study was docketed with the CEC and summarized in a journal article.
- Evaluated impacts of on-shore oil drilling activities on large-scale coastal erosion in Nigeria.
- For a 500-MW combined-cycle power plant, identified and evaluated methods to reduce water use and water quality impacts. These included the use of zero-liquid-discharge systems and alternative cooling technologies, including dry and parallel wet-dry cooling. Prepared cost analyses and evaluated impact of options on water resources. This work led to a settlement in which parallel wet dry cooling and a crystallizer were selected, replacing 100 percent groundwater pumping and wastewater disposal to evaporation ponds.

### Applied Ecology, Industrial Ecology and Risk Assessment

Experience in applied ecology, industrial ecology and risk assessment, including human and ecological risk assessments, life cycle assessment, evaluation and licensing of new chemicals, and fate and transport studies of contaminants. Experienced in botanical, phytoplankton, and intertidal species identification and water chemistry analyses. Some typical projects include:

- For the California Coastal Conservancy, San Francisco Estuary Institute, Invasive Spartina Project, evaluated the potential use of a new aquatic pesticide for eradication of non-native, invasive cordgrass (*Spartina spp.*) species in the San Francisco Estuary with respect to water quality, biological resources, and human health and safety. Assisted staff in preparing an amendment to the Final EIR.
- Evaluated likelihood that measured organochlorine pesticide concentrations at a U.S. naval air station are residuals from past applications of these pesticides consistent with manufacturers' recommendations. Retained as expert witness in lawsuit.
- Prepared human health risk assessments of air emissions from several industrial and commercial establishments, including power plants, refineries, and commercial laundries.
- Managed and conducted studies to license new pesticides. This work included the evaluation of the adequacy and identification of deficiencies in existing physical/chemical and health effects data sets, initiating and supervising studies to fill data gaps, conducting environmental fate and transport studies, and QA/QC compliance at subcontractor laboratories. Prepared licensing applications and coordinated the registration process with German licensing agencies. This work led to regulatory approval of several pesticide applications in less than six months.
- Designed and implemented database on physical/chemical properties, environmental fate, and health impacts of pesticides for a major European pesticide manufacturer.
- Designed and managed toxicological study on potential interference of delta-9-tetrahydrocannabinol in food products with U.S. employee drug testing; co-authored peer-reviewed publication.
- Critically reviewed and prepared technical comments on AFCs for several natural-gas fired and geothermal power plants and transmission lines in California permitted by the CEC. The comments addressed avian collisions and electrocution, construction and operational noise impacts on wildlife, risks from brine ponds, and impacts on endangered species.
- For a 180-MW geothermal power plant, evaluated the impacts of plant construction and operation on the fragile desert ecosystem in the Salton Sea area. This work included baseline noise monitoring and assessing the impact of noise, brine handling and disposal, and air emissions on local biota, public health, and welfare.
- Designed research protocols for a coastal ecological inventory; developed sampling methodologies, coordinated field sampling, determined species abundance and distribution in intertidal zone, and analyzed data.
- Designed and conducted limnological study on effects of physical/chemical parameters on phytoplankton succession; performed water chemistry analyses and identified phytoplankton species; co-authored two journal articles on results.
- Conducted technical, ecological, and economic assessments of product lines from agricultural fiber crops for European equipment manufacturer; co-authored proprietary client reports.
- Developed life cycle assessment methodology for industrial products, including agricultural fiber crops and mineral fibers; analyzed technical feasibility and markets for thermal insulation materials from plant fibers and conducted comparative life cycle assessments.
- Conducted and organized underwater surveying and mapping of plant species in several lakes and rivers in Sweden and Germany as ecological indicators for the health of limnological ecosystems.

## PRO BONO ACTIVITIES

- Management of “SecondAid,” a non-profit organization providing tsunami relief for the recovery of small family businesses in Sri Lanka. ([www.secondaid.org](http://www.secondaid.org))
- Technical consulting for Lakota Village Fund, a non-profit organization for environmental improvement and economic development projects for the Pine Ridge Reservation in South Dakota. ([www.lakota-village.de](http://www.lakota-village.de))

## PROFESSIONAL AFFILIATIONS

American Chemical Society  
American Institute of Chemical Engineers  
Association of Environmental Professionals

## SELECTED PUBLICATIONS

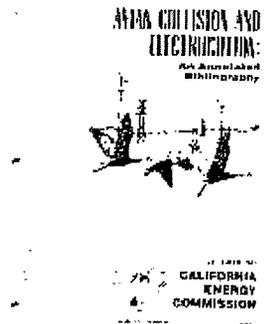
- Fox JP and Pless P, Cost-effectiveness of catalytic oxidation for the control of VOCs and CO from power generation facilities, to be submitted to Journal of the Air & Waste Management Association.
- Fox JP and Pless P, Fuel and energy penalties associated with catalytic pollution control systems used in power generation, to be submitted to Power Engineering.
- Fox JP, Rose TP, Sawyer TL, and Pless P, Isotope hydrology of a spring-fed waterfall in fractured volcanic rock, to be submitted to Journal of Hydrology.
- Leson G and Pless P, Hemp seeds and hemp oil, in: Grotenhermen F and Russo E (eds), Cannabis und Cannabinoids, Pharmacology, Toxicology, and Therapeutic Potential, The Haworth Integrative Healing Press, New York, 2002.
- Leson G, Pless P, Grotenhermen F, Kalant H, and ElSohly M, Evaluating the impact of hemp food consumption on workplace drug tests, Journal of Analytical Toxicology, vol. 25 (11/12), pp. 1–8, 2001.
- Pless P, Technical and environmental assessment of thermal insulation materials from fiber crops, doctoral dissertation in Environmental Science and Engineering, University of California, Los Angeles, 2001.
- Leson G and Pless P, Assessing the impact of THC uptake from hemp oil cosmetics on workplace drug testing, Report to the Agricultural Research and Development Initiative (“ARDI”), Morris, MB, 2001.
- Leson G and Pless P, Hemp Foods and Oils for Health, Your Guide to Cooking, Nutrition and Body Care, HempTech, Sebastopol, CA, 1999.
- Leson G and Pless P, What variety? Hemp cultivars for Canada, Commercial Hemp, Fall 1998, pp. 7–8.
- Leson G and Pless P, Farming and processing: Technology status, Commercial Hemp, Summer 1998, pp. 5–6.
- Center for Waste Reduction Technologies in the American Institute of Chemical Engineers, Collaborative Biofilter Project, Technical Report, co-author with Leson G of sections ‘Compound Database,’ ‘Design Manual,’ and ‘Literature Database,’ 1998.
- Hantke B, Domany I, Fleischer P, Koch M, Pless P, Wiendl M, and Melzer M, Depth profiles of the kinetics of phosphatase activity in hardwater lakes of different trophic level, Arch. Hydrobiologia, vol. 135, pp. 451–471, 1996.

Hantke B, Fleischer P, Domany I, Koch M, Pless P, Wiendl M, and Melzer M, P-release from DOP by phosphatase activity in comparison to P-excretion by zooplankton: studies in hardwater lakes of different trophic level, *Hydrobiologia*, vol. 317, pp. 151–162, 1996.

Pless P, Untersuchungen zur Phytoplanktonentwicklung im Herrensee (investigations on phytoplankton succession in an oligotrophic hardwater lake), Masters thesis in biology with focus on botany/ecology/limnology, Technical University of Munich, Germany, 1991.

# ***Avian Collision and Electrocution: An Annotated Bibliography***

**California Energy Commission**  
October 1995  
Publication Number: P700-95-001



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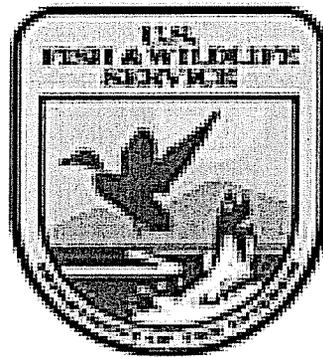
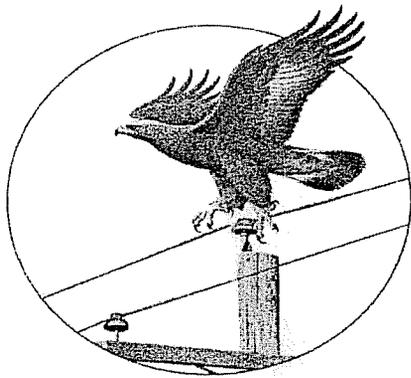
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## **ACKNOWLEDGEMENTS**

The work on this annotated bibliography started in 1986 and progressed to completion with the assistance of several hard-working persons. We would like to acknowledge and thank these people for their efforts.

We are grateful to James Estep for the initial literature collection efforts. Over the years, Joan Humphrey, Martin Scheel, Katherine Bodeman-Wadsworth, and Dick Anderson continued the literature search. We could not have gathered such a diversity of books, reports, and articles without

# AVIAN PROTECTION PLAN (APP) GUIDELINES



*A Joint Document Prepared By*

**The Edison Electric Institute's Avian Power Line  
Interaction Committee (APLIC)**

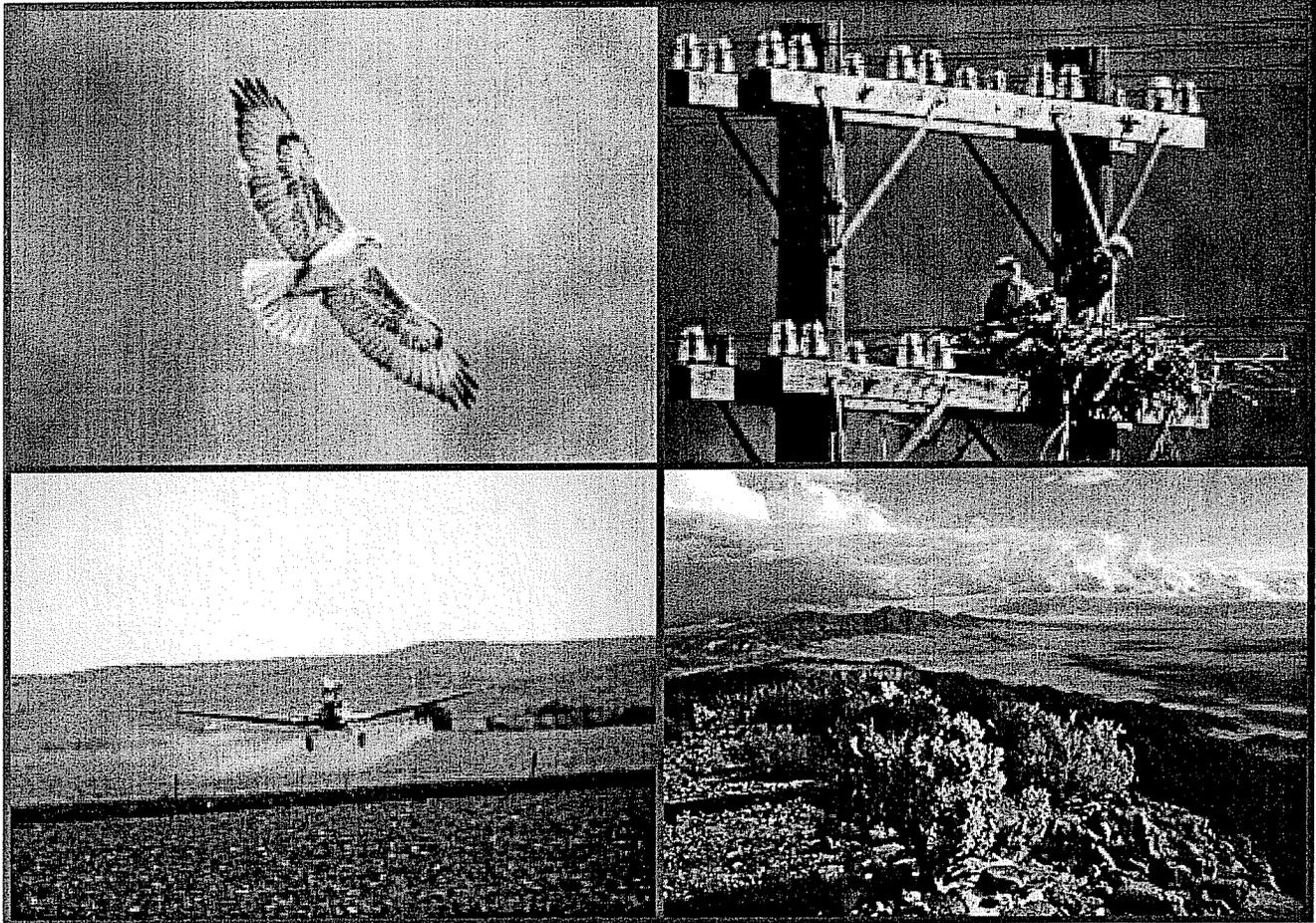
*and*

**U.S. Fish and Wildlife Service (USFWS)**

*April 2005*



# HAWKWATCH INTERNATIONAL RAPTOR CONSERVATION PROGRAM: ISSUES AND PRIORITIES



John P. DeLong  
Interim Conservation Scientist  
HawkWatch International, Inc.  
1800 South West Temple, Suite 226  
Salt Lake City, UT 84115

October 2000

# TECHNICAL BULLETIN

## *Raptor Electrocutions and Distribution Pole Types*

by: **Rick Harness**

EDM International, Inc.  
Fort Collins, Colorado

### **Abstract**

*The electrocution of raptors and larger perching birds is a global hazard of overhead distribution construction, especially in treeless areas with abundant prey where poles make attractive perches. Disturbed by the continuing large numbers of raptors, particularly eagles, electrocuted along power lines, the U.S. Fish and Wildlife Service has begun to step up enforcement of the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. In 1999, Moon Lake Electrical Association, Inc. (MLEA) of Utah was charged with electrocuting 17 large raptors and violating the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. MLEA was ultimately given three years of probation, ordered to pay \$100,000 in fines and restitution, and required to retrofit structures dangerous to migratory birds.*

*Electrocution hazards can be greatly reduced through modifications to existing design standards. However, most modifications in North America are designed for use on wood poles and crossarms. As other materials (e.g. fiberglass, concrete and steel poles) are used as an alternative to wood, construction techniques should adhere to established engineering criteria such as Basic Impulse Insulation Level (BIL) and state-of-the-art raptor protection.*

*Because steel and reinforced concrete poles are more conductive than wood or fiberglass,*



## **ATTACHMENT 2**

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

**IN THE MATTER OF:**

<b>JOINT APPLICATION OF LOUISVILLE</b>	)
<b>GAS AND ELECTRIC COMPANY AND</b>	)
<b>KENTUCKY UTILITIES COMPANY FOR</b>	)
<b>A CERTIFICATE OF PUBLIC CONVENIENCE</b>	)DOCKET NO.
<b>AND NECESSITY FOR CONSTRUCTION</b>	)2005-00142
<b>OF TRANSMISSION FACILITIES IN</b>	)
<b>JEFFERSON, BULLITT, MEADE AND</b>	)
<b>HARDIN COUNTIES, KENTUCKY</b>	)

**AFFIDAVIT**

Leslie E. Barras, being sworn, states:

1. I am the Associate Director of River Fields, Inc. I also am the Conservation Chair of the Greater Louisville Group of the Sierra Club. Formerly, I was a Principal Project Manager with Radian International, where I directed projects relating to permitting, regulatory analysis and compliance, auditing, training, and site investigations. In my capacity at River Fields, as a volunteer with the Sierra Club, and in my former position at Radian, my 22 years of experience includes projects subject to the National Environmental Policy Act and the National Historic Preservation Act. I have made this affidavit of my own personal knowledge.

2. I am making this statement to inform the Public Service Commission of the necessity for the Louisville Gas and Electric Company and the Kentucky Utilities Company ("LG&E/KU") to satisfy the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 et seq. ("Section 106"). LG&E/KU proposes to construct a 345 kV transmission line, approximately 41.9 miles in length, running from LG&E's Mill Creek Substation through Jefferson, Bullitt, Meade, and Hardin Counties to KU's Hardin County Substation near Elizabethtown, Kentucky. The proposed transmission line is actually a fraction of a much larger project to expand the generation of power in this region of the state with the construction of a 750 MW nominal coal-fired base load generating unit in Trimble County. LG&E/KU's proposal constitutes an "undertaking" subject to the requirements of Section 106.

3. Based on my understanding of the decisions made thus far by LG&E/KU and the extent to which they have not examined the adverse effects of their proposal, I believe that the Public Service Commission should withhold its approval of the application until a full and appropriate examination has been made. LG&E/KU have chosen the route for their proposed transmission line without first inviting the comments and participation of Consulting Parties (see definition below). In fact, LG&E/KU have chosen the route of their proposed transmission line without first identifying historic properties that would be affected by this undertaking. LG&E/KU has indicated that they are initiating a Section 106 process, in which they may modify their selected route depending on what potential adverse effects are located during the

application process. In effect, LG&E/KU presume to satisfy Section 106 in reverse. Such decisionmaking is contrary to the requirements of Section 106.

4. Section 106 requires federal agencies to examine the adverse effects of the proposed “undertaking” on sites on or eligible for the National Register of Historic Places, and afford the federal Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the undertaking before the Public Service Commission may approve their application. 16 U.S.C. § 470f. A federal agency may allow other entities, such as private applicants like LG&E/KU, to implement the Section 106 process, subject to the federal agency’s oversight. 36 C.F.R. § 800.2(a).

5. The Section 106 regulations, 36 C.F.R. Part 800, attached as Exhibit 1, define “undertaking” as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 36 C.F.R. § 800.16(y). The proposed transmission line, as LG&E/KU has indicated by their initiation of the Section 106 process, is an “undertaking.”

6. As a result, the regulations require LG&E/KU to determine the area of potential effect (APE), *id.* § 800.4(a)(1); identify, through consultation, the National Register-listed or eligible historic properties within the APE, *id.* § 800.4(b); determine whether the undertaking will adversely affect any identified historic properties, *id.* § 800.5; and resolve those adverse effects through avoidance or mitigation as documented in a Memorandum of Agreement. *Id.* § 800.6(b). In accordance with the regulations, “[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” *Id.* § 800.5(a)(1).

7. The Advisory Council rules implementing Section 106 require that Consulting Parties be identified and given an opportunity to participate in consultation with the private applicant, other Consulting Parties, the SHPO, the Advisory Council, and the public during each step of the Section 106 process, *Id.* § 800.3(f). “Consulting Parties” include “individuals and organizations with a demonstrated interest in the undertaking [who] may participate [in the Section 106 process] due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” *Id.* § 800.2.

8. The Section 106 regulations state how LG&E/KU can satisfy the consultation requirements:

The applicant “shall involve consulting parties” in “findings and determinations made during the section 106 process.” 36 C.F.R. § 800.2(a)4.

The applicant “should plan consultations appropriate to the scale of the undertakings and the scope of Federal involvement and coordinate with other requirements of other statutes, as applicable, such as the National Environmental Policy Act [NEPA].” *Id.*

The applicant must, “except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.” 36 C.F.R. § 800.2(d)(2).

The applicant “shall consult with the SHPO/THPO [State and Tribal Historic Preservation Officers] and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.” 36 C.F.R. § 800.6.

The applicant “shall provide to all consulting parties the documentation specified in Sec. 800.11(e), subject to the confidentiality provisions of Sec. 800.11(c) and such other documentation as may be developed during the consultation to resolve adverse effects.” 36 C.F.R. § 800.6(a)(3).

State Historic Preservation Officers, “other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.” 36 C.F.R. § 800.8(a)(2).

The applicant “should ensure that preparation of . . . an Environmental Impact Statement . . . includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.” 36 C.F.R. § 800.8(a)(3).

The applicant “shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis.” 36 C.F.R. § 800.11(a).

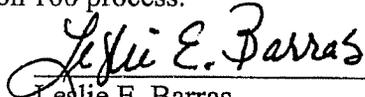
9. Thus, in order to satisfy the consulting requirements of Section 106, LG&E/KU must provide Consulting Parties with factual information and data necessary to provide for meaningful comment on the Section 106 determinations. Necessary factual information and data include, but may not be limited to:

- A map of the APE with supporting data on how the proposed APE was derived (e.g., direct impact corridor, viewshed analyses, footprint for construction)
- aesthetic and visual quality documentation, including viewshed maps;
- federal prime and unique farmlands analysis;
- report on the elements of community character;
- report on listed or eligible properties identified within the APE, including boundaries of properties, such as historic farms.
- report on any other utilities that may have to be relocated during construction;
- An alternatives analysis providing documentation of why corridors have been eliminated from consideration;
- information regarding indirect and cumulative effects on historic properties and resources; and
- information that would allow the Consulting Parties to respond to the scope and adequacy of the archaeological resources evaluation.

All of this information is necessary to provide meaningful comment on the APE, identification of historic properties within the APE, potential effects upon those properties, and proposed measures to resolve (mitigate or avoid) any adverse effects.

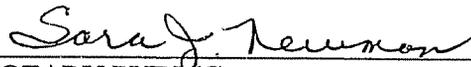
10. Based on the law outlined above, LG&E/KU should have engaged the Consulting Parties prior to and in furtherance of their evaluation of alternatives to the proposed transmission line, including alternative corridors.

11. In light of LG&E/KU's failure to execute their responsibilities under Section 106, the Public Service Commission should suspend its consideration of LG&E/KU's application until LG&E/KU initiates and completes the Section 106 process.

  
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 Leslie E. Barras

COUNTY OF JEFFERSON )  
 ) ss:  
 STATE OF KENTUCKY )

Subscribed and sworn to by Leslie E. Barras before me this 21<sup>st</sup> day of July, 2005.

  
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 NOTARY PUBLIC

My commission expires: April 24, 2007

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## **ATTACHMENT 3**

### Subpart B—The section 106 Process

#### § 800.3 Initiation of the section 106 process.

(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) *Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then

initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process

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al consulting parties. Cer- ds and organizations with ed interest in the under- participate as consulting e the nature of their legal relation to the under- ected properties, or their the undertaking's effects operties.

lic. (1) *Nature of involve- ws of the public are essen- rmed Federal decision- e section 106 process. The d shall seek and consider the public in a manner he nature and complexity aking and its effects on rties, the likely interest in the effects on historic nfidentiality concerns of duals and businesses, and ip of the Federal involve- ndertaking.*

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ency procedures. The agen- y use the agency's proce- ic involvement under the ronmental Policy Act or a requirements in lieu of ement requirements in this part, if they provide ortunities for public in- nsistent with this sub-

#### § 800.4

with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is

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appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

#### § 800.4 Identification of historic properties.

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation,

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as long as the consulting parties and the public have an opportunity to express their views, as defined in § 800.2(d).

#### Identification of historic properties

*Scope of identification effort.* In consultation with the SHPO/THPO, the agency official shall identify and document the area of potential effects, as defined in § 800.2(d).

existing information on historic properties within the area of potential effects, including any data on accessible historic properties identified; information, as appropriate, regarding parties, and other individuals or organizations likely to be affected, or concerns with respect to historic properties in the area, and information relating to the underlying effects on historic properties.

Information from any Indian or Native Hawaiian organization identified pursuant to § 800.3(f) in identifying properties, including off-tribe lands, of religious and cultural significance to them and may be eligible for the National Register, recognition of an Indian tribe or Native Hawaiian organization may be reluctant to provide specific information regarding location, nature, and access to such sites. The identification should address concerns regarding confidentiality pursuant to § 800.2(d).

*Historic properties.* Based on information gathered under the provisions of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious or cultural significance to the area of potential effects, the agency official shall take the necessary steps to identify historic properties within the area of potential effects.

*Effort.* The agency official shall exercise reasonable and good faith in carrying out appropriate identification, which may include field research, consultation,

oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance.* (1) *Apply National Register criteria.* In consultation with the SHPO/THPO and

any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off-tribe lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation.* (1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available

§ 800.5

for public inspection prior to approving the undertaking. If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking or the SHPO/THPO or the Council objects to the agency official's finding under paragraph (d)(1) of this section, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

§ 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

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(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with finding.* Unless the Council is reviewing the finding pursuant to § 800.5(c)(3), the agency official may proceed if the SHPO/THPO agrees with the finding. The agency official shall carry out the undertaking in accordance with § 800.5(d)(1). Failure of the SHPO/THPO to respond within 30 days from receipt of the finding shall be considered agreement of the SHPO/THPO with the finding.

(2) *Disagreement with finding.* (i) If the SHPO/THPO or any consulting party disagrees within the 30-day review period, it shall specify the reasons for disagreeing with the finding. The agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraph (c)(3) of this section.

(ii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period specify the reasons for disagreeing with the finding; and request the Council to review the finding pursuant to paragraph (c)(3) of this section.

(iii) If the Council on its own initiative so requests within the 30-day review period, the agency official shall submit the finding, along with the documentation specified in § 800.11(e), for review pursuant to paragraph (c)(3) of this section. A Council decision to make such a request shall be guided by the criteria in appendix A to this part.

(3) *Council review of findings.* When a finding is submitted to the Council pursuant to paragraph (c)(2) of this section, the agency official shall include the documentation specified in § 800.11(e). The Council shall review the finding and notify the agency official

of its determination as to whether the adverse effect criteria have been correctly applied within 15 days of receiving the documented finding from the agency official. The Council shall specify the basis for its determination. The agency official shall proceed in accordance with the Council's determination. If the Council does not respond within 15 days of receipt of the finding, the agency official may assume concurrence with the agency official's findings and proceed accordingly.

(d) *Results of assessment.* (1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

#### § 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely ef-

fects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects.* (1) *Resolution without the Council.*

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the

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the consultation, the Council will no-  
tify the agency and proceed to com-  
ment in accordance with §800.7(c).

(2) *Resolution with Council participa-*  
*tion.* If the Council decides to partici-  
pate in the consultation, the agency of-  
ficial shall consult with the SHPO/  
THPO, the Council, and other con-  
sulting parties, including Indian tribes  
and Native Hawaiian organizations  
under §800.2(c)(3), to seek ways to  
avoid, minimize or mitigate the ad-  
verse effects. If the agency official, the  
SHPO/THPO, and the Council agree on  
how the adverse effects will be re-  
solved, they shall execute a memo-  
randum of agreement.

(c) *Memorandum of agreement.* A  
memorandum of agreement executed  
and implemented pursuant to this sec-  
tion evidences the agency official's  
compliance with section 106 and this  
part and shall govern the undertaking  
and all of its parts. The agency official  
shall ensure that the undertaking is  
carried out in accordance with the  
memorandum of agreement.

(1) *Signatories.* The signatories have  
sole authority to execute, amend or  
terminate the agreement in accordance  
with this subpart.

(i) The agency official and the SHPO/  
THPO are the signatories to a memo-  
randum of agreement executed pursu-  
ant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/  
THPO, and the Council are the signato-  
ries to a memorandum of agreement  
executed pursuant to paragraph (b)(2)  
of this section.

(iii) The agency official and the  
Council are signatories to a memo-  
randum of agreement executed pursu-  
ant to §800.7(a)(2).

(2) *Invited signatories.* (i) The agency  
official may invite additional parties  
to be signatories to a memorandum of  
agreement. Any such party that signs  
the memorandum of agreement shall  
have the same rights with regard to  
seeking amendment or termination of  
the memorandum of agreement as  
other signatories.

(ii) The agency official may invite an  
Indian tribe or Native Hawaiian orga-  
nization that attaches religious and

cultural significance to historic prop-  
erties located off tribal lands to be a  
signatory to a memorandum of agree-  
ment concerning such properties.

(iii) The agency official should invite  
any party that assumes a responsi-  
bility under a memorandum of agree-  
ment to be a signatory.

(iv) The refusal of any party invited  
to become a signatory to a memo-  
randum of agreement pursuant to para-  
graph (c)(2) of this section does not in-  
validate the memorandum of agree-  
ment.

(3) *Concurrence by others.* The agency  
official may invite all consulting par-  
ties to concur in the memorandum of  
agreement. The signatories may agree  
to invite others to concur. The refusal  
of any party invited to concur in the  
memorandum of agreement does not  
invalidate the memorandum of agree-  
ment.

(4) *Reports on implementation.* Where  
the signatories agree it is appropriate,  
a memorandum of agreement shall in-  
clude a provision for monitoring and  
reporting on its implementation.

(5) *Duration.* A memorandum of  
agreement shall include provisions for  
termination and for reconsideration of  
terms if the undertaking has not been  
implemented within a specified time.

(6) *Discoveries.* Where the signatories  
agree it is appropriate, a memorandum  
of agreement shall include provisions  
to deal with the subsequent discovery  
or identification of additional historic  
properties affected by the undertaking.

(7) *Amendments.* The signatories to a  
memorandum of agreement may amend  
it. If the Council was not a signatory  
to the original agreement and the sig-  
natories execute an amended agree-  
ment, the agency official shall file it  
with the Council.

(8) *Termination.* If any signatory de-  
termines that the terms of a memo-  
randum of agreement cannot be or are  
not being carried out, the signatories  
shall consult to seek amendment of the  
agreement. If the agreement is not  
amended, any signatory may terminate  
it. The agency official shall either exe-  
cute a memorandum of agreement with  
signatories under paragraph (c)(1) of  
this section or request the comments  
of the Council under §800.7(a).

§ 800.7

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

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(c) *Comments by the Council.* (1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(1) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 Coordination With the National Environmental Policy Act.

(a) *General principles.* (1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies

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l principles. (1) *Early coordi-* eral agencies are encour- ordinate compliance with and the procedures in this ay steps taken to meet the s of the National Environ- icy Act (NEPA). Agencies

should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/ THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to §800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/ FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§800.3 through 800.6 if the

agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to §800.3(f) or through the NEPA scoping process with results consistent with §800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and (v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.*

(1) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or

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Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall notify the agency official either that it agrees with the objection, in which case the agency official shall enter into consultation in accordance with §800.6(b)(2) or seek Council comments in accordance with §800.7(a), or that it disagrees with the objection, in which case the agency official shall continue its compliance with this section. Failure of the Council to respond within the 30 day period shall be considered disagreement with the objection.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) A binding commitment to such proposed measures is incorporated in:

(A) The ROD, if such measures were proposed in a DEIS or EIS; or

(B) An MOA drafted in compliance with §800.6(c); or

(ii) The Council has commented under §800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the

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ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§800.3 through 800.6 will be followed as necessary.

### § 800.9 Council review of section 106 compliance.

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants.* (1) *Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan

the binding commitment not to paragraph (c)(4) of the act carried out, the agency shall notify the Council and other parties that supplemental documents will be required for compliance with NEPA procedures in §§800.3 through 800.6 will be followed as necessary.

#### Review of section 106

of agency official compliance with section 106. The agency official shall provide to the agency official its opinion regarding the findings, determination or regarding the adequacy of the agency official's compliance with section 106 procedures under this section. The Council may provide such advice at the request of any agency official or organization or individual. The agency official shall consider the views of the public in reaching a decision on the undertaking.

**Foreclosure of the Council's comment.** Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part, the Council's opportunity to comment shall be foreclosed. The Council shall determine if foreclosure has occurred. The Council shall notify the agency official of the agency's Federal preservation requirements and allow 30 days for the agency official to provide information. If foreclosure has occurred, the Council shall determine if foreclosure has occurred. The Council shall transmit its determination to the head of the agency. The Council shall also make the determination to be interested in the undertaking and its effects upon historic properties.

**Minimization of adverse effects by applicant responsibility.** Section 106 of the act prohibits a Federal agency from granting a loan, loan

guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

**(2) Consultation with the Council.** When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

**(3) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.**

**(4) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.**

**(5) Compliance with Section 106.** If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

**(d) Evaluation of Section 106 operations.** The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

**(1) Information from participants.** Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

**(2) Improving the operation of section 106.** Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

#### § 800.10 Special requirements for protecting National Historic Landmarks.

**(a) Statutory requirement.** Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic

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Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

§ 800.11 Documentation standards.

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall re-

view any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality.* (1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency



permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

§ 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries.*

(1) *Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

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es without prior planning. Properties are discovered or effects on historic property after the agency official the section 106 process. Publishing a process under this section, the agency shall make reasonable efforts to minimize or mitigate such properties and: agency official has not undertaken or if construction has not been approved, consult to resolve pursuant to § 800.6; or agency official, the SHPO/Indian tribe or Native organization that might affect cultural significance of property agree that is of value solely for its historic, historic or archaeological, the agency official with the Archeological Reservation Act instead in this part and process, the SHPO/THPO, and or Native Hawaiian organization a report on the actions a reasonable time after they are

agency official has approved and construction has determine actions that official can take to resolve, and notify the SHPO/Indian tribe or Native organization that might attach cultural significance to property, and the Council of the discovery. The all describe the agency of National Register of the property and to resolve the adverse SHPO/THPO, the Indian Hawaiian organization shall respond within 48 notification. The agency take into account their ns regarding National lity and proposed ac- carry out appropriate agency official shall pro- THPO, the Indian tribe organization and report of the actions completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

**Subpart C—Program Alternatives**

**§ 800.14 Federal agency program alternatives.**

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the FEDERAL REGISTER and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the FEDERAL REGISTER.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

- (i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;
- (ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) When nonfederal parties are delegated major decisionmaking responsibilities;
- (iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or
- (v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.*

(1) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and

members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency

procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories.* (1) *Criteria for establishing.* An agency official may propose a program or category of agency undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

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(2) *Public participation.* The agency of-  
ficial shall arrange for public partici-  
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cial shall consider the nature of the ex-  
emption and its likely effects on his-  
toric properties and take steps to in-  
volve individuals, organizations and  
entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.*  
The agency official shall notify and  
consider the views of the SHPOs/  
THPOs on the exemption.

(4) *Consultation with Indian tribes and  
Native Hawaiian organizations.* If the ex-  
empted program or category of under-  
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tural significance to an Indian tribe or  
Native Hawaiian organization, the  
Council shall follow the requirements  
for the agency official set forth in  
paragraph (f) of this section.

(5) *Council review of proposed exemp-  
tions.* The Council shall review a re-  
quest for an exemption that is sup-  
ported by documentation describing  
the program or category for which the  
exemption is sought, demonstrating  
that the criteria of paragraph (c)(1) of  
this section have been met, describing  
the methods used to seek the views of  
the public, and summarizing any views  
submitted by the SHPO/THPOs, the  
public, and any others consulted. Un-  
less it requests further information,  
the Council shall approve or reject the  
proposed exemption within 30 days of  
receipt, and thereafter notify the agen-  
cy official and SHPO/THPOs of the de-  
cision. The decision shall be based on  
the consistency of the exemption with  
the purposes of the act, taking into  
consideration the magnitude of the ex-  
empted undertaking or program and  
the likelihood of impairment of his-  
toric properties in accordance with sec-  
tion 214 of the act.

(6) *Legal consequences.* Any under-  
taking that falls within an approved  
exempted program or category shall re-  
quire no further review pursuant to  
subpart B of this part, unless the agen-  
cy official or the Council determines  
that there are circumstances under  
which the normally excluded under-

taking should be reviewed under sub-  
part B of this part.

(7) *Termination.* The Council may ter-  
minate an exemption at the request of  
the agency official or when the Council  
determines that the exemption no  
longer meets the criteria of paragraph  
(c)(1) of this section. The Council shall  
notify the agency official 30 days be-  
fore termination becomes effective.

(8) *Notice.* The agency official shall  
publish notice of any approved exemp-  
tion in the FEDERAL REGISTER.

(d) *Standard treatments.* (1) *Establis-  
ment.* The Council, on its own initiative  
or at the request of another party, may  
establish standard methods for the  
treatment of a category of historic  
properties, a category of undertakings,  
or a category of effects on historic  
properties to assist Federal agencies in  
satisfying the requirements of subpart  
B of this part. The Council shall pub-  
lish notice of standard treatments in  
the FEDERAL REGISTER.

(2) *Public participation.* The Council  
shall arrange for public participation  
appropriate to the subject matter and  
the scope of the standard treatment  
and consistent with subpart A of this  
part. The Council shall consider the na-  
ture of the standard treatment and its  
likely effects on historic properties and  
the individuals, organizations and enti-  
ties likely to be interested. Where an  
agency official has proposed a standard  
treatment, the Council may request  
the agency official to arrange for pub-  
lic involvement.

(3) *Consultation with SHPOs/THPOs.*  
The Council shall notify and consider  
the views of SHPOs/THPOs on the pro-  
posed standard treatment.

(4) *Consultation with Indian tribes and  
Native Hawaiian organizations.* If the  
proposed standard treatment has the  
potential to affect historic properties  
on tribal lands or historic properties of  
religious and cultural significance to  
an Indian tribe or Native Hawaiian or-  
ganization, the Council shall follow the  
requirements for the agency official set  
forth in paragraph (f) of this section.

(5) *Termination.* The Council may ter-  
minate a standard treatment by publi-  
cation of a notice in the FEDERAL REG-  
ISTER 30 days before the termination  
takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the FEDERAL REGISTER of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian

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If the Council declines to comment, the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

**Withdrawal of comment.** If the agency official determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council shall withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for individual undertakings.

**Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.** Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and Native Hawaiian organizations.

**Identifying affected Indian tribes and Native Hawaiian organizations.** If a program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify the Indian tribes having jurisdiction over such lands. If a program alternative has the potential to affect historic properties of cultural significance to a tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify the Indian tribes and Native Hawaiian organizations that might attach cultural significance to the program alternative and consult with them. If the program alternative has applicability, the agency shall identify an appropriate government consultation with affected Indian tribes and Native Hawaiian organizations in accordance with existing Executive orders, memoranda, and applicable laws.

**Summary of consultation.** The agency shall provide summaries of the results of any written consultation provided by affected Indian

tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

**§ 800.15 Tribal, State, and local program alternatives. [Reserved]**

**§ 800.16 Definitions.**

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day or days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary

of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with §800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or

in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

APPENDIX A TO PART 800—CRITERIA FOR COUNCIL INVOLVEMENT IN REVIEWING INDIVIDUAL SECTION 106 CASES

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to §800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns

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